Supreme Court, U.S.
FILED
OCT 31 2008
OFFICE OF THE CLERK

No. 07-1317

In The Supreme Court of the United States

ROLAND ANTHONY EVANS,

Petitioner,

v.

GENE M. JOHNSON, Director of The Virginia Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

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PETITION TO REHEAR
PETITION FOR A WRIT OF CERTIORARI

Counsel for Petitioner Roland Anthony Evans petitions the Court to rehear the merits of the Court's decision with regard to the above styled case pursuant to Rule 44 of the Supreme Court of the United States.

Evans' petition was denied a writ of certiorari on October 6, 2008.

This petition is restricted to other substantial grounds not previously presented, specifically, petitioner's Right to Due Process.

I. INTRODUCTION

Petitioner Evans submitted his initial petition for writ of certiorari to the Court on April 18, 2008, based on Petitioner's Sixth Amendment Right to a fair trial by an impartial jury.

II. GROUNDS NOT PREVIOUSLY PRESENTED VIOLATION OF DUE PROCESS

Petitioner Evans presents to this Court this petition to rehear based on the violation of his constitutional rights guaranteed by the Fourteenth Amendment's Due Process Clause.

1. According to the sentencing transcript, the record supports the finding that Juror Haley and the trial judge held an *ex parte* communication between the last day of trial on June 27, 2001, when the juror misconduct was revealed to the court and the day of the petitioner's sentencing hearing on

October 4, 2001. The record is completely void of any hearings between these dates with defendant or counsel.

The transcript of the October 4, 2001, sentencing hearing does not include any testimony at all of Juror Haley. Yet the court made the following statement which indicates that the court must have had improper contact with the juror. October 4, 2001, Sentencing transcript, pp. 14, 15.

> THE COURT: Well Mr. Haley, the juror [in the] matter, did say that the statement was already written out, typed, when he [investigator Clarence E. Nelson] came to see Mr. Haley in the first place. He also implied that Mr. Nelson that came to see him was from the Commonwealth Attorney's office rather than the Public Defender's office. He [investigator Nelson] did imply those things but I do not find that any of those rise to the level of fraud in the matter. Maybe over-zealous perhaps but to put this to rest, **I asked the juror about this particular event and he told me** what it was and he signed an Affidavit on his own, the last one [which was supplied by the Office of the Commonwealth's attorney]I might say, which qualifies the question to my satisfaction that the things that were said and the statements submitted by the Public Defender's officer were incorrect. Emphasis added.

Again, the record is completely void of this exchange between the court and the juror. That being the case, it was a private exchange between the juror and the court concerning an ongoing controversy, which is highly improper and a violation itself of due process.

On the basis of an *ex parte* communication with Mr. Haley, off the record and with no opportunity for cross examination, the court accepted Mr. Haley's word that there was only one contact with Investigator Nelson [instead of the two contacts stated in investigator Nelson's affidavit] and was handed a typed paper which he did not read, did not understand, and yet he signed it. The court then proceeded to state on the record "that the things that were said and the statements submitted by the Public Defender's office were incorrect."

> "As a general rule, all communications between the trial judge and the jury, after the submission of the case must take place in open court and in the presence of or after notice to the parties or their counsel." Klesser v. Stone, 201 S.E.2d 269 (W. Va. 1973).
>
> In addition, Section 19.2-263.1, Code of Virginia (1950) "prohibits contact between a judge and juror in a criminal proceeding outside the presence of the parties or their counsel."

III. FINDING OF FACT AND CONCLUSIONS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

1. Federal and State courts have found that undisclosed *ex parte* communications establish federal constitutional error.

a. Juror Haley should have promptly notified the trial judge and counsel for all parties after his *ex parte* verbal exchange with "Uncle Hester."

b. Trial Judge should not have participated in an *ex parte*, "off the record" conversation with Juror Haley in order to obtain relevant and pertinent information with regard to a matter in controversy.

2. Petitioner Evans has a right to counsel United States v. Morrison, 449 U.S. 361 (1981) and a right to be present at all phases of trial. Snyder v. Massachusetts, 291 U.S. 97, 114-118, 54 S. Ct. 330, 335-336, 78 L. Ed. 674 (1934).

> We assume in aid of the petitioner that, in a prosecution for a felony, the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant

> by the Sixth Amendment in prosecutions in the federal courts (Gaines v. Washington, at p. 277 U. S. 85), and, in prosecutions in the state courts, is assured very often by the constitutions of the states.

IV. CONCLUSION

An ex parte conversation by the judge with a juror during the course of a defendant's trial was and is a well recognized violation of that defendant's due process rights.

In the interest of justice this Court should review and grant certiorari to this petitioner as the Court has so ruled according to the due process clause of the Fourteenth Amendment.

CERTIFICATE PURSUANT TO SUP. CT. RULE 44

It is hereby certified that this petition is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. It is presented in good faith and not for delay.

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